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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 1945**

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No. **433**

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CECIL WELLS,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY

Respondent,

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE COURT OF APPEALS OF KENTUCKY  
AND BRIEF IN SUPPORT THEREOF.**

---

**E. SELBY WIGGINS,**  
Counsel for Petitioner.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Cecil Wells, respectfully represents that he was indicted for murder at the October Term, 1944 of the Madison Circuit Court, Richmond, Kentucky and in the twenty-fifth judicial district of the Commonwealth of Kentucky and on October 27th., 1944, he filed a motion for bail in the Madison Circuit Court and on November 15th., 1944, the Honorable William J. Baxter, the judge of the said court, denied his petition for bail. Your petitioner states that Section Sixteen of the Constitution of Kentucky, which is a part of the Bill of Rights provides among other things as follows:

“All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great.”

Your petitioner states from the evidence shown in the killing of Oscar Beasley, that said killing was accidental and was not murder and from that evidence the proof was not evident or the presumption great that a murder was committed.

Your petitioner states that it was the duty of the lower court on that occasion to allow bail, that he was able to give bail in any amount to insure his appearance in the February term of the Madison Circuit Court, 1945. Your petitioner states that he was not permitted to give bail and that he filed a petition for Habeas Corpus on November 20th., 1944, which was denied by the Honorable William J. Baxter, Judge of the Madison Circuit Court; That he took an appeal from the ruling of the Honorable William J. Baxter to the Court of Appeals, which affirmed the judgment of the Madison Circuit Court, denying his petition for bail; That the action of both courts was in the opinion of your petitioner illegal, arbitrary, capricious and in violation of his constitutional rights to bail; That he was confined in jail in Richmond, Madison County, Kentucky until after his trial; That his case was set for trial on Monday, February 12th., 1945; That by reason of illegal restraint he was unable to properly prepare his case for trial, February 12th., 1945; That on the trial of said case in the Madison Circuit Court, he was convicted of voluntary manslaughter and sentenced to the State Penitentiary for five years; That he appealed said case to the Court of Appeals of Kentucky and the Judgment of the Madison Circuit Court was affirmed; That during the pendency of the case in the Court of Appeals he was under a bond in the sum of \$5000.00 and that the Mandate of the Court of Appeals was issued on April 30th., 1946; That under the laws of the State of Kentucky it is his duty to surrender himself to the Sheriff of Madison County and by him, be taken to the State Penitentiary at La Grange, Kentucky and be confined there for a period of five

years.

That pending application for this Writ of Certiorari of this court, your petitioner has executed bond in the sum of \$5000.00, staying the execution of the enforcement of the judgment of the Madison Circuit Court and the Court of Appeals of Kentucky. Said bond, having been approved the 23rd. day of May, 1946 and said stay of Execution, having been granted by the Honorable William H. Rees, Chief Justice of the Court of Appeals of Kentucky.

Plaintiff says that the judgment of the Madison Circuit Court and judgment of the Court of Appeals of Kentucky are erroneous and that he prays this Honorable Court require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided in United States Code Section 237, amended. Your petitioner states that he is entitled to equal protection of the law, under the Fourteenth Amendment to the United States Constitution; That his rights of equal protection by the law have been violated; That under the law in Kentucky Defendant in a Criminal case has the legal right to appeal from the judgment of the lower court to the Court of Appeals of Kentucky; That in order to take the appeal, it is necessary for the Defendant to have the testimony, given in the trial of the Circuit Court, taken down by the official stenographer and transcribed and filed in the Court of Appeals in Kentucky; That it is a rule of law in Kentucky that it is the duty of the Defendant to show all of the testimony, given or heard at the trial and your petitioner states that he was denied equal protection of the law with other citizens of Kentucky by the unreasonable ruling of the Honorable William J. Baxter, Judge of Madison Circuit Court, as shown by question 38, in his petition for Rehearing, as follows:

“Q. 38. Now Where did you go?

Counsel for defendant questioning witness at a very rapid rate—stenographer unable to tell who is trying to do the talking.

**BY THE COURT:** Too fast—get what you can, leave the rest alone. Give both side exceptions to that ruling of the Court.”

By reason of the ruling of the court all the testimony was not transcribed and he was not able to present his case in full to the Court of Appeals, by reason of the ruling of the lower court, he was prejudiced in his substantial rights and in violation of the fourteenth amendment to the Constitution of the United States.

Your petitioner further states that the Court of Appeals did not and could not know what evidence was left out by reason of the fact that the official stenographer certified that the transcript of the evidence filed in the Court of Appeals of Kentucky contained all of the evidence given or heard in the trial of your petitioner in the Madison Circuit Court. Whereas, there was in fact other evidence given and heard in the Madison Circuit Court and the Court of Appeals was not advised what that evidence was. Your petitioner had to do the best he could with the material he had for the appeal of his case. Your petitioner states that he was convicted without due process of the law in violation of the Fifth Amendment to the Constitution of the United States, to-wit: “That it was unconstitutional and in violation of your petitioner’s rights for the Court to fail to provide an official stenographer to get all of the evidence heard in his case.” As the Attorney for the Appellant in the Court of Appeals of Kentucky, stated in the Petition for Rehearing: “We think that this was prejudicial to the rights of the defendant, as he had a right to have this testimony taken down just as it was given, and, of course, we could not give what

evidence was left out, and we think that if the stenographer was unable to get the questions that Court should have asked counsel to have asked the questions again more slowly. The defendant was paying \$10.00 a day for the purpose of getting this testimony down in the record, in addition to paying more than \$100.00 for the Transcript of Evidence, and is entitled to all the evidence that was heard by the Jury."

Your petitioner prays this Honorable Court to take jurisdiction of this case under United States Code 237.

Your petitioner further states that under the laws of the State of Kentucky, Section KRS 29.070 makes the following provisions in regard to the selection of jurors: "(1) The jury commissioners shall take the last returned tax commissioner's book for the county and from it shall carefully select from the intelligent, sober, discreet and impartial citizens, resident housekeepers in different portion of the county, over twenty-one years of age, the following number of names of such persons:

(c) In counties having a population of more than twenty-thousand and not more than fifty thousand, not less than five hundred nor more than six hundred.

(2) They shall write the name, and in counties containing a city of the first, second or third class the address of each person so selected, in plain handwriting, on a small slip of paper, each slip being as near the same size and appearance as practicable. Each slip shall be by them enclosed in a small case and deposited unsealed, in a revolving drum, but before depositing any of the slips in the drum they shall carefully examine its contents and remove and destroy any slips found therein.

(3) When the slips have been deposited in the drum, it shall be locked and revolved or so shaken as to thoroughly mix the slips. It shall then be unlocked and they shall draw therefrom a sufficient

number or names to procure twenty-four persons qualified to act as grand jurors. If the name of any person not qualified to act as grand juror is drawn, it shall be returned to the drum. The names shall be drawn one by one, and only the names of those qualified shall be recorded on paper until the twenty-four are secured. The list shall be certified, signed and enclosed by them in an envelope made of good paper, sealed and their names written across the seal, and directed to the judge of the circuit court, adding the words, "criminal division," when the court is divided into branches, and endorsed, "A list of the grand jury for the.....Circuit Court to be held in the month of.....in the year.....," adding the words, "criminal division" after the words, "circuit court," when there are branches of the circuit court. From this list the next grand jury for the county shall be impaneled as hereinafter directed."

(4) After completing the list of grand jurors, they shall lock the drum and revolve or shake it so as to thoroughly mix the slips remaining therein, and then unlock it and draw therefrom, one by one, the names of not less than thirty nor more than thirty-six persons, as the judge of the court may direct, and record the same upon paper as drawn. The list shall be certified, signed and enclosed by them in an envelope made of good paper, sealed and their names written across the seal, and directed to the judge of the circuit court, adding the name of the division of the court, for which the list is selected when the court is divided into branches and endorsed. "A list of the petit jury for the.....year.....," "adding the name of the division of the court for which the jury is selected when the circuit court is divided into branches. From this list the next petit jury for the court shall be selected and impaneled as hereinafter directed.

(5) The slips of paper upon which are written



the names of persons placed by the commissioners upon the lists of the grand and petit jurors shall be destroyed by the commissioners as soon as the names are recorded on the list."

Section KRS 20.080: "(1) When the commissioners have completed the list of jurors they shall lock the drum containing the remaining names and deliver it and the key, the sealed lists and all slip cases not used to the judge of the circuit court for which the jurors are selected, who shall deliver them, except the key, to the circuit clerk in open court and at the time administer to him and his deputies the following oath: "You do solemnly swear that you will not open this drum except in open court under the direction of the judge of this court, and that you will not open the envelopes containing the lists of petit (or grand and petit jurors, as the case may be), for the session of this court to be held in the month of.....in the year of....., until the time fixed by law; that you will not, directly or indirectly, converse with any one selected as a petit juror concerning any suit for trial in this court, at its next term, unless by leave of court." If the clerk subsequently, in vacation, appoints a deputy he shall administer to him a like oath."

Section KRS 29.130: "(1) At each term of circuit court, of circuit courts having terms, held within one year after commencement of the term at which the commissioners were appointed, the judge shall, in open court, draw from the drum a sufficient number of names to procure the names of twenty-four persons qualified to act as grand jurors, record the names of the twenty-four qualified upon paper, certify and sign it. The judge shall then, after having locked and revolved or shaken the drum, reopen it and draw therefrom the names of not less than thirty nor more than thirty-six persons, in the discretion of the judge, to act as petit jurors, record their names on paper, certify and sign it. Sessions

of a court having continuous session held at the county seat of a county in which there is a city of the second class at which part of its sessions are authorized to be held shall be deemed terms of court within the meaning of this section."

Your petitioner states that the method adopted by the Commonwealth of Kentucky for selection of jurors absolutely makes ineligible to jury service in Kentucky persons not owning real or personal property in said state; that regardless of how intelligent or how good a citizen, persons without property, can not serve on the petit jury or the grand jury in the Commonwealth of Kentucky; That said method of selection of petit jurors and grand jurors is contrary to the Bill of Rights and the Constitution of the Commonwealth of Kentucky, as provided by Section 3 of said Constitution, reading as follows: "No. 3 Equality; exclusive privileges; amendment of charters.—All men, when they form a social compact, are equal; and no grant or exclusive, separate public emoluments or privileges shall be made to any man or set or men, except in consideration of public service; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."

That said Bill of Rights, Section 11 reads as follows: "No. 11. Rights of accused in criminal cases; change of venue. In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a

speedy public trial by an impartial jury of the vicinage."

That said method of selecting petit jurors and grand jurors is in violation of the Constitution of the United States, Amendment five....." nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment Six—"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Also in violation of the Fourteenth Amendment of the Constitution of the United States, reading as follows: Amendment Fourteen—Section I—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges** or **immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the **equal protection of the laws.**"

Wherefore, Petitioner prays that a Writ of Certiorari issued under the seal of this Court, directed to the Court of Appeals of Kentucky to the end that this case may be reviewed and determined by this Court as provided by the Statutes of the United States, that the judgment herein of said Court of Appeals of Ken-

tucky be reversed by this Court, that said Court be directed to set aside the verdict of the jury and the judgment of the Madison Circuit Court; and for such other and further relief as to the Court may seem proper.

<sup>2nd</sup>  
Dated July —, 1946.

CECIL WELLS,

*Cecil Wells* Petitioner.

E. SELBY WIGGINS,

Counsel for Petitioner.

# **SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 1945**

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## **BRIEF**

### **IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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#### **I**

A brief statement of the facts in this case are as follows:

The petitioner, Cecil Wells, was a young man, about thirty-eight years of age and was a blacksmith and owned a sawmill and small farm at the time of the death of Oscar Beasley. Previous to this time he had been a soldier in the Army of the United States. He served from September 1926 to September, 1929 and that he had an Honorable discharge, with an excellent record on that discharge; that he reenlisted in the Second World War from May 1942 and served until Oct. 1943, at which time he was discharged. On May 30th., 1943, he was awarded the Good Conduct Medal. Copy of award, reads as follows:

**BATTERY A**  
**2nd. ANTI-AIRCRAFT REPLACEMENT**  
**TRAINING BATTALION**  
**FORT EUSTIS, VIRGINIA**

Date **8 June 1943**

**SUBJECT:** Award of Good Conduct Medal.

**TO:** Commanding Officer, **1st AART Group**, Fort Eustis, Virginia.

Under provision of AR 600-68 as amended by Section II, War Department Bulletin No. 6, dated April 10, 1943, **Corporal Cecil Wells 6642324** is qualified and recommended for the award of a Good Conduct Medal, having become eligible on **May 30, 1943** by reason of having completed (1) year of service.

R. W. PERLOWSKI,  
 Captain, CAC,  
 Commanding.

201—Wells, Cecil (Enl) Est Ind.

Hq 1st, AART GP, FORT EUSTIS, VA., (Date) 8 June 1943.

To: **Corporal Cecil Wells 6642824** Fort Eustis, Va.,  
 (Thru: CO Btry A 2nd. AART Bn(

1. Award of Good Conduct Medal is approved.
2. You are being presented with a service ribbon, as Good Conduct Medals will not be manufactured until after cessation of hostilities.
3. It is a pleasure to make this award for exemplary behavior, efficiency and fidelity in the service of the United States.
4. Appropriate entry has been made in your Service Record of this award.

By order of Colonel Humbert:

HARRY W. BROWN,  
 Major, CAC,  
 Adjutant.

Entered in S/R **8 June 1943**  
 (date)

.....  
 Initials of Pers O. K.

Form P-18 (5-20-43)

A copy of Cecil Wells discharge from the United States Army and copy of his enlistment record are as follows:

**"ARMY OF THE UNITED STATES**

**HONORABLE DISCHARGE**

This is to certify that

**CECIL WELLS**

6642824, Corporal, Medical Department

**ARMY OF THE UNITED STATES**

is hereby Honorably Discharged from the Military Service of the United States of America.

This certificate is awarded as a testimonial of Honest and Faithful Service to his country.

Given at Fort Eustic, Va.

Date 4 Oct 43

**A. G. GARDNER,**  
COLONEL, Infantry.  
Commanding"

**ENLISTMENT RECORD OF**

<b>Wells</b>	<b>Cecil</b>	<b>(NMI)</b>
(Last Name)	(First Name)	(Middle Initial)

6642824

Corporal

(Army Serial No.)

(Grade)

Born in Paint Lick, in the State of Kentucky.

Enlisted 30 May, 1942, at Fort Benjamin, Ind.

When enlisted he was 35—9/12 years of age and by occupation a Service Station Attendant.

He had Brown eyes, Brown hair, Medium complexion, and was 6 fet 1 inch in height.

Complete 1 years, 4 months, 5 days service for longevity pay.

Prior service: 2 Btry D 65th Coast A. Sept. 17/1926 to Sept. 28/1929;

Discharged as Private, Character Excellent; By reason of C. of C. No time lost AW 107.

FORT EUSTIS, VA.

Oct. 4, 1943

PAID IN FULL \$58.74.

Noncommissioned officer

Corporal 8-17-42

Military qualifications 3 None.

Army specialty Leader Platoon (651) SS7-28-42;

Leader Squad (653) S 9-30-42.

Attendance at None

(Name of noncommissioned officers' or special service school.)

Battles, engagements, skirmishes, expeditions None

E. R. King.

Decorations, service medals, citations Good Conduct

Medal 6-8-43

Wounds received in service None

Date and result of smallpox vaccination 4 6-2-42:

Vaccinoid E. R. KIND, Lt. Col., F.B.

Date of completion of all typhoid-paratyphoid vaccinations 4 6-15-42.

Date and result of diphtheria immunity test (Schick)

4 None

Date of other vaccinations (specify vaccine used) 4

tetanus Toxoid: 8-7-42. Tet Tox Stim Shot: 3-26-43

Physical condition when discharged Poor—

Married or single—Married.

Honorably discharged by reason of 5 Sec. II AR

61-5-360 & 2nd Ind CDD Hq Ft. Eustis Va dtd 9-28-43

CHARACTER Excellent—Periods of active duty

6 None

Remarks 7 No time lost under AW 107, Soldier entitled to travel pay.

(Finger Print)

Print of Right Thumb

Signature of Soldier CECIL WELLS

JOHN C. KEELE, JR.

1st Lt., MED

UNIT PERS, O.



Certification made by Finance.....  
 U. S. Army, Cincinnati, Ohio, for  
 Mustering Out Payment under the  
 Act of Feb. 3, 1944 in the amount  
 of \$200.00 R. K.

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Cecil Wells was a married man and living with his wife and three children in Paint Lick, Kentucky, a small village of Garrard County, Kentucky, just beyond the line of Madison County, Kentucky.

Cecil Wells left his home on Sunday, October 22nd., 1944 and started rabbit hunting. He was intending to go up to his farm to kill a mess of rabbit; that in Paint Lick, he stopped and asked Sam Hurt, Frank Hurt and Oscar Beasley, who were in Paint Lick, if they had seen Earl Rhoddus and they said, "Yes, he left here going squirrel hunting." They said, "where are you going?" and I said, "I am going up to my farm to kill me a mess of rabbits." One of them spoke up, I think it was Beasley and said, "what about us going with you?" I said, "O. K., come on." The men got in the car and we started off on this trip. We drove up Copper Creek pike to Cartersville, when the boys mentioned getting some whiskey. I told them I did not want any whiskey but if they wanted to get whiskey it was all right with me. The men bought some whiskey and the three men got pretty drunk. Wells claimed he only tasted the whiskey, one time, as he was not drinking when they got in the car.

When the question came up as to who was the best shot. It was decided that Beasley was. He took the gun and got out several times and went out in the fields but he did not find any rabbits. One time he took a shot at a telephone pole, just why he did this, no one knows. About dark, he got out on the running board of the car and looked for rabbits by the light of the car. They did not find any rabbits so he took Sam Hurt to Paint Lick and took him to

the door of his home and he started to take Frank Hurt home. That left Frank Hurt, Oscar Beasley and Cecil Wells in the car. Cecil Wells drove the car in the direction of Frank Hurt's home across the bridge of Silver Creek, which is a dividing line of Madison County and Garrard County and past the gate to the road leading to Oscar Beasley's home and went on to Frank Hurt's home and let him out there. Frank Hurt stated that Oscar Beasley got out in the gate leading to his own home, but it was shown that he was very drunk and did not give this testimony positively.

On one of the occasions in the afternoon, when Beasley got out of the car to hunt for rabbits and was getting back into the car, in handling the shot gun he let the barrel of it go back and was pointing in the windshield of the car. Cecil Wells told Beasley to turn that gun the other direction because it was pointed right back in my face and Frank Hurt's face. I hollered three times, to turn that gun in the other direction. He did get off the fender and came around the car. When he came around I heard him mumbling and talking. When he came around to the door he threw this gun to his shoulder and threw the barrel right within five or six inches of my face. I threw my body back. I grabbed the gun, the barrel of it, I gave it a snatch and jerked it away from him. When I did he came right in on the seat on his hands. I shoved him back off. I said, "what in the world is the matter with you, Slick?" I said, "what do you mean with that old gun pointing it around like that?" He said, "I know what I am doing. I had the gun pointed right." He was getting in the car during the time. He was getting seated in the seat and he said, "I don't have to ride in this car, if you don't want me I will get out." He moved to get out and I pushed him and said, "get out" and when he did I put the car in low and backed in low gear.

Cecil Wells, then drove up the Walnut-Meadow

road to Frank Hurt's home and during the remainder of the journey, Wells said "Frank, what about that man, "What's the matter with him?" Frank said, "he will be all right in the morning. Pick him up as you go back and take him on home." Later Frank Hurt said "you are going back down and pick Slick up aren't you?" Wells said, "I don't know." "I was disgusted with what had happened. He said, "go on back and pick him up." Frank Hurt got out the whiskey and asked Wells to take a drink but Wells did not do so. After Wells let Hurt out he came back around the Walnut-Meadow road and stopped and told Oscar Beasley to come on and get in and "Let's go home." Wells stated that he then asked Beasley what was the matter with his face; that Beasley reached up with his hand and when he brought it down there was blood on it. Beasley said, "You hit me with somethin." Wells said, "no, I didn't hit you." "Let's go home and get to bed." Beasley said, "What did you hit me with?" Wells said, "I didn't hit you, the ground flew up and hit you." Beasley then said, "There never was a man that put a scar on my face and lived." He said, "my face has never been scarred." Wells then said, "Slick, I haven't hit you with nothing, come on and let's go home." Wells stated that Beasley quieted down until they got to the first gate going to his home; that he told Beasley to leave the gate open and he would close it as he came back. Beasley also got out and opened the second gate, which was also left open; that they drove slowly down the private road, which was a very rough road, which led to Beasley's home; that nothing had been said from gate number two to Beasley's home; that Beasley raised up and said, "let me tell you something, there is no god-damned son-of-abitch that can put a scar on my face and live." I saw his hand between the windshield and the light. I saw the knife in his hand and he made a lunge, and when he did I felt the point of the knife

on my left collar bone, I threw my body to my right and backed away from his knife. I grabbed with both hands when I saw the knife coming, with my arm on the steering wheel I released the steering wheel with my right hand, I threw my body away from the knife. I caught his right arm in my right hand and threw this knife away from me. Wells stated that Beasley was sitting in the front seat of the car by Wells; that Beasley raised up from the seat and picked up the shot gun that was sitting against the gear shift; that the gun was sitting with the stock on the floor board, with the barrel against the windshield; that Beasley grabbed the gun with his left hand and that he had the knife in his right hand; that Beasley pointed the gun at Wells and he grabbed this shot gun with his left hand and shoved it away from him; that while this was going on Wells yelled, "look out, Slisk, don't cut me with that knife, I am not going to hurt you." Wells said, "Please, to the man. He thought this would quiet him down; that Beasley kept trying to shoot him and he was trying to quiet him down; that Beasley, at this time was partly in the door of the car, most of his body was on the outside of the car, that his feet were on the ground; that his right arm was in the car and part of his body; that the gun went off, while he was scuffling with Beasley to keep him from shooting him with the gun or cutting him with the knife; that when the gun was fired, the blood from Beasley and his brains was scattered on the inside of the car. Beasley's body was found lying about ..... feet from the gate, lying on his back with the knife in his hand.

After the shooting Wells heard a woman scream and he discovered another car pulling up behind him; that he turned his car around and drove away from the scene and went to the Deputy Sheriff of Garrard County and the Sheriff of Garrard County brought him to Madison County and told the Sheriff what had

happened and he did not realize that the shooting had occurred in Madison County and that the Deputy Sheriff went to Paint Lick to find out the condition of Beasley and he reported that Beasley was dead and Wells came to the Madison Jail and gave himself up about ten minutes before one o'clock and brought the gun with him and turned it over to the jailer of Madison County.

Appellant, testified that he had no intention of shooting Beasley and he did not know of any reason why Beasley conceived the desire to kill him. Cecil Wells testified that he did not point the gun at Beasley and that he did not intend shooting him, that the shooting was accidental. Another important fact in the case that was not brought out in the trial in the Madison Circuit Court was that Cecil Wells did not have the gun all afternoon. That Wells had given him two shot-gun-shells. It is the custom of all hunters to take the shells out of the gun when not in use. He left the shells in the gun evidently with the intention of shooting Wells. Wells had no opportunity to see if the gun was loaded or to see if Beasley had taken the shells out of the gun. That Cecil Wells filed a motion to be permitted to execute bail, which the court denied. He then filed a petition for a Writ of Habeas Corpus on November 20th., 1944. Your petitioner states that Section Sixteen of the Constitution of Kentucky, which is a part of the Bill of Rights, provides among other things as follows:

"All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great."

Alleging in his petition that the killing of Oscar Beasley was accidental and not murder. The Madison Circuit Court denied your petitioner bail. The appeal was taken to the court of Appeals of Kentucky and the Judgment of the Madison Circuit Court was

affirmed by the Court of Appeals and your petitioner contends that the judgment of both courts is in violation under Section 16 of the Constitution of the State of Kentucky. In the case of the Commonwealth of Kentucky vs. Stahl 237 Ky., 388; 35 South Western (2,) 563 decided February 13, 1931, The Court of Appeals wrote the following law:

“Burden of Proof on Commonwealth. When an indictment is returned by the grand jury into open court charging a capitol offense, the circuit court may or may not, deny bail in his discretion, and that method of procedure we do not mean to disturb. But when the defendant appears and moves for bail he is entitled to have his motion sustained, unless the Commonwealth produces proof showing that the proof of guilt is evident or the presumption of guilt great.’

Mr. Wells was confined in jail from October 22nd., 1944 until he was placed on trial. Motion for bail was made on October 22nd., 1944.

The defendant was tried by a jury of Madison County citizens selected in the manner detailed in part B. of this brief February 12th., 1945 he was unable to get out and talk to his witnesses or prepare his proof in the case.

Your petitioner contends that he was deprived of his liberty under Section 14 of the Constitution of the United States; that on account of being unable to talk to his witnesses and prepare his evidence, he was convicted of voluntary manslaughter on trial and was sentenced to the penitentiary for a period of five years. Motion and ground for new trial were duly filed and motion was taken to the Court of Appeals of Kentucky and the judgment of the Madison Circuit Court was affirmed; that said case can be found in 193 Southwestern (2d), 645, the Court of Appeals concluding its judgment in that case as follows:

"While we are not happy to see this young man of a family, a former soldier, enmeshed in his present trouble, yet we are confronted with a decision of his selected jury finding him guilty and a search of the record discloses no reversible errors committed against his substantial rights on this trial."

## II-BASIS OF JURISDICTION

Under the provisions of the United States Code 237 as amended, your petitioner states that he is entitled to equal protection by the law, under the Fourteenth Amendment to the United States Constitution; That his rights of equal protection under the law has been violated; That under the law in Kentucky the Defendant in a Criminal case has the legal right to appeal from the judgment of the lower court to the Court of Appeals of Kentucky; That in order to take the appeal, it is necessary for the Defendant to have the testimony, given in the trial of the Circuit Court, taken down by the official stenographer and transcribed and filed in the Court of Appeals in Kentucky; That it is a rule of law in Kentucky that it is the duty of the Defendant to show all of the testimony, given or heard at the trial and your petitioner states that he was denied equal protection of the law with other citizens of Kentucky by the unreasonable ruling of the Honorable William J. Baxter, Judge of Madison Circuit Court, as shown by question 38, in his petition for Rehearing, as follows:

"Q. 38. Now where did you go?

Counsel for Defendant questioning witness at a very rapid rate—Stenographer unable to tell who is trying to do the talking.

BY THE COURT: Too fast—get what you can, leave the rest alone. Give both side exceptions to that ruling of the Court."



Your petitioner further states that the Court of Appeals did not and could not know what evidence was left out by reason of the fact that the official stenographer certified that the transcript of the evidence filed in the Court of Appeals of Kentucky contained all of the evidence given or heard in the trial of your petitioner in the Madison Circuit Court. Whereas, there was in fact other evidence given or heard in the Madison Circuit Court and the Court of Appeals was not advised what that evidence was. Your petitioner had to do the best he could with the material he had for the appeal of his case. Your petitioner states that he was convicted without due process of the law in violation of the Fifth Amendment to the Constitution of the United States, to-wit: "That it was unconstitutional and in violation of your petitioner's rights for the Court to fail to provide an official stenographer to get all of the evidence heard in his case." As the Attorney for the Appellant in the Court of Appeals of Kentucky, states in the Petition for Rehearing: "We think that this was prejudicial to the rights of the defendant, as he had a right to have this testimony taken down just as it was given, and, of course, we could not give what evidence was left out, and we think that if the stenographer was unable to get the question the Court should have asked counsel to have asked the questions again more slowly. The defendant was paying \$10.00 a day for the purpose of getting this testimony down in the record, in addition to paying more than \$100.00 for the Transcript of Evidence, and is entitled to all the evidence that was heard by the Jury."

## 2A.

Your petitioner states that under the laws of the State of Kentucky, Section KRS 29.070 makes the following provisions in regard to the selection of



jurors: "(I) The jury commissioners shall take last returned tax commissioner's book for the county and from it shall carefully select from the intelligent, sober, discreet and impartial citizens, resident house-keepers in different portions of the county, over twenty-one years of age, the following number of names of such persons:

(c) In counties having a population of more than twenty thousand and not more than fifty thousand, not less than five hundred nor more than six hundred.

(2) They shall write the name, and in counties containing a city of the first, second or third class the address of each person so selected, in plain handwriting, on a small slip of paper, each slip being as near the same size and appearance as practicable. Each slip shall be by them enclosed in a small case and deposited, unsealed, in a revolving drum, but before depositing any of the slips in the drum they shall carefully examine its contents and remove and destroy any slips found therein.

(3) When the slips have been deposited in the drum, it shall be locked and revolved or so shaken as to thoroughly mix the slips. It shall then be unlocked and they shall draw therefrom a sufficient number of names to procure twenty-four persons qualified to act as grand jurors is drawn, it shall be returned to the drum. The names shall be drawn one by one, and only the names of those qualified shall be recorded on paper until the twenty-four are secured. The list shall be certified, signed and enclosed by them in an envelope made of good paper, sealed and their names written across the seal, and directed to the judge of the circuit court, adding the words, "criminal division," when the court is divided into branches, and endorsed, "A list of the grand jury for the ..... Circuit Court to be held on the month of ..... in the year.....," adding the words, "criminal division" after the words, "circuit court," when there are branches of

the circuit court. From this list the next grand jury for the county shall be impaneled as hereinafter directed."

(4) After completing the list of grand jurors, they shall lock the drum and revolve or shake it so as to thoroughly mix the slips remaining therein, and then unlock it and draw therefrom, one by one, the names of not less than thirty nor more than thirty-six persons, as the judge of the court may direct, and record the same upon paper as drawn. The list shall be certified, signed and enclosed by them in an envelope made of good paper, sealed and their names written across the seal, and directed to the judge of the circuit court, adding the name of the division of court, for which the list is selected when the court is divided into branches and endorsed, "A list of the petit jury for the ..... year ..... " "adding the name of the division of the court for which the jury is selected when the circuit court is divided into branches. From this list the next petit jury for the court shall be selected and impaneled as hereinafter directed.

Your petitioner states that the method adopted by the Commonwealth of Kentucky for selection of jurors absolutely makes eligible to jury service in Kentucky, **only persons owning real or personal property in said state; that regardless of how intelligent or how good a citizen may be, persons without property,** can not serve on the petit or grand jury in the Commonwealth of Kentucky; That said method of selection of petit jurors and grand jurors are contrary to the Bill of Rights and the Constitution of the Commonwealth of Kentucky, as provided by Section Three of said Constitution, reading as follows: "No. 3 Equality; exclusive privileges; amendment of character. All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public

services; but no property shall be exempt from taxation except as provided in this Constitution and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."

That said Bill of Rights, Section 11 reads as follows: No. 11. "Rights of accused in criminal cases; change of Venue. In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage."

That said method of selecting petit jurors and grand jurors is in violation of the Constitution of the United States, Amendment five—"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment six—"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Also in violation of the Fourteenth Amendment of

the Constitution of the United States, reading as follows: Amendment Fourteen—Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The United States Supreme Court in the case styled *Gilbert E. Thiel*, Petitioner *South Pacific Company No. 349* in an opinion written by Judge Murphy on the 20th day of May, 1946, 66 Supreme Court Reporter 984, at which time the Attorney for the Petitioner in this case was sworn in as a member of the bar of this court, heard the opinion read the substance of the case as I gathered it was that Petitioner brought suit against the Southern Pacific Railroad to recover damages for injury to his person. Suit was filed in the Federal Court of California and it was shown that the District judges had formally agreed that they would not summons nor require jurors who were laborers to serve as jurors in the United States District Court due to the fact, that jurors were only paid four dollars per day, when these jurors were making from eight to ten dollars per day, that the rule was promulgated by the district judges solely to prevent hardship on laborers causing them to lose four or more dollars per day, while serving on the jury. This court in said opinion by Judge Murphy held that laborers were just as much entitled to serve on the jury of the district court as any other juror.

That the plaintiff in that case had a right to have a jury composed of citizens of the district in which the case was tried, unhampered by any such rule as to the selection of the jurors and for that reason

alone, the case was reversed. Judge Frankfurter who I believe read the opinion stating that the time he read the opinion that the law laid down in this case may cause other cases to be reversed. He would not know how many.

Your Petitioner contends that the manner of selection of jurors in the State of Kentucky, is absolutely unconstitutional and that the jury in this case was unconstitutionally selected; that he was compelled to select twelve men from the list given to him by the Madison Circuit Court of jurors, who owned property, either personal or real. None, under the provisions of the Kentucky law can serve on the jury of the Circuit Court unless he is a property owner. We contend that the Appellant in this case was tried by a unconstitutionally selected jury. It matters not under the jury service law of Kentucky how intelligent or how good a citizen, a person may be, he can not serve on a petit jury or a grand jury in the Commonwealth of Kentucky, unless he owns property. Your petitioner further stats that his constitutional rights have been violated; that the grand jury which found the indictment against your petitioner was composed of jurors as heretofore set out and the Constitution provides "as your petitioner contends" under the laws of the State of Kentucky, that the Jury from which your petitioner was tried was selected in violation of the Fourteenth Amendment of the Constitution of the United States. Amendment Fourteen, Section 1.—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## III

Your petitioner states that he was convicted without due process of the law in the Fourteenth Amendment of the United States Constitution and that his rights of equal protection of the law were violated in his trial.

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This court with reference to trial by jury stated, the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith vs. Texas*, 311 U. S. 129, 130; *Glasser vs. United States*, 315 U. S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. **But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.** Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

The undisputed evidence in this case *Thiel vs. Southern Pacific Company Supra* demonstrates failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage. They generally used the city directory as the source of names of prospective jurors.

This exclusion of all those who earn a daily wage cannot be justified by federal or state law. Certainly nothing in the federal statutes warrants such an exclusion.

If workmen were systematically not drawn for the jury, the practice would be indefensible. But concern over discrimination against wage earners must be put out of the reckoning.

A competent juror under Kentucky law, under the provisions of KRS 29.020 is "No person shall be a qualified juror for the trial of criminal, penal or civil cases in any court, unless he is a citizen at least twenty-one years of age, a housekeeper, sober, temperate, discreet and of good demeanor."

### CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be granted.

E. SELBY WIGGINS,  
Counsel for Petitioner.

*E. Selby Wiggins*

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**FILED**

DEC 2 1946

CHARLES ELMORE CROPLEY  
CLERK

# Supreme Court of the United States

OCTOBER TERM 1946

No. 433

CECIL WELLS - - - - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - Respondent

Statement Opposing Jurisdiction and  
Motion to Dismiss  
Petition for Writ of Certiorari

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# Supreme Court of the United States

OCTOBER TERM, 1946

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No. 433

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CECIL WELLS ..... *Petitioner*

VS.

COMMONWEALTH OF KENTUCKY ..... *Respondent*

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS  
PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

## STATEMENT

Respondent, Commonwealth of Kentucky, files this its statement in opposition to the petition of defendant Cecil Wells for writ of certiorari to the Court of Appeals of Kentucky and his brief in support of that petition. So that this court might have a clear idea of the steps taken, we briefly restate the facts.

Petitioner Cecil Wells was indicted for murder at the October 1944 term of the Madison Circuit Court and, after indictment, entered a motion for bail. His motion for bail was overruled on October 27, 1944, and on November 28, 1944, Wells instituted a habeas corpus proceeding against

the Madison County jailer, alleging that, according to Section 16 of the Kentucky Constitution, which reads in part as follows,

“All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great \* \* \*,”

he was entitled to bail although he was charged with a capital offense. After hearing, the Madison Circuit Judge denied the writ and dismissed the action, from which Wells appealed to the Court of Appeals of Kentucky. That court, on December 15, 1944, in the case of Wells v. Dunn, Jailer, reported in 299 Ky. 51, 184 S. W. (2d) 223, sustained the judgment of the lower court on the ground that the trial judge did not abuse the discretion lodged in him under the State Constitution.

The case then went on to trial on its merits and on February 12, 1946, Wells was convicted of manslaughter and sentenced to five years imprisonment. From this judgment also Wells appealed to the Court of Appeals of Kentucky. As in the case of the appeal from the habeas corpus ruling, the Court of Appeals of Kentucky affirmed the judgment of the Madison Circuit Court, which decision is reported as Wells v. Commonwealth, 302 Ky. 15, 193 S. W. (2) 645.

THE SUPREME COURT OF THE UNITED STATES WILL NOT CONSIDER ANY CONSTITUTIONAL QUESTIONS NOT FIRST PRESENTED AND PASSED ON BY THE HIGHEST COURT OF THE STATE.

When Wells appealed to the Kentucky Court of Appeals from the judgment of the Madison Circuit Court finding him guilty of the offense of manslaughter, he listed three grounds for reversal, each of which was discussed by the Court of Appeals in its decision. As dis-

closed by the opinion of the Court of Appeals of Kentucky, speaking through Judge Eugene Siler, that court had before it "as grounds for reversal of the judgment of the trial court . . . (1) there should be a directed verdict of acquittal and that (2) the voluntary manslaughter instruction given by the trial court was erroneous and that (3) the rulings of the trial court on admission and rejection of evidence were erroneous." The Court of Appeals concluded that "a search of the record discloses no reversible errors committed against his substantial rights upon this trial." It is from this judgment of the Kentucky Court of Appeals that Wells now seeks relief. He has filed the petition for a writ of certiorari from this court to the Court of Appeals of Kentucky to revoke the judgment of that court, which was rendered on January 22, 1946. In support of his petition for writ of certiorari, and as a basis of the jurisdiction of this court, Petitioner asserts that two errors have been committed:

1. The trial court failed to have counsel ask questions more slowly, so that the court stenographer was unable to take down all the answers and that the official transcript, when finally prepared, was incomplete. This was declared to be in violation of the 5th Amendment to the United States Constitution (Pages 21, 22, Petitioner's Brief).
2. The method prescribed by KRS 29.070 for the selection of petit jurors, and actually followed in this case, violated the 5th and 14th Amendments to the United States Constitution (Pages 22 to 29, Petitioner's Brief).

A comparison of the objections listed in the Kentucky courts with those raised in this court will reveal indisputable disparity. Wells did not list in the Madison Circuit Court or in the Kentucky Court of Appeals those objections which he raises here now.

This court has often stated that for it to consider any federal question in any case brought here from a state court, the federal question must have been presented first to the state court and action must have been taken on that question in the state court. If a federal question is brought up for the first time in this court after an opportunity has arisen to bring it up in the state court, then this court is without jurisdiction to pass on those questions.

This point has long been established as a law of rule and practice.

In the 1926 case of *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641, 71 Law Ed. 1095, this court made the following statements:

"We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear either from the order of the Court of Appeal or from the record otherwise, that any other federal question was presented not either expressly or necessarily decided by that court. *National Bank v. Commonwealth*, 9 Wall. 353, 363; *Edwards v. Elliott*, 21 Wall. 532, 557; *Dewey v. Des Moines*, 173 U. S. 193, 200; *Keokuk and Hamilton Bridge Company v. Ill.* 175 U. S. 626, 633; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248; *Havie v. Rice*, 204 U. S. 291, 301; *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 126. *Mo. Pac. Ry. v. Coal Co.* 256 U. S. 134, 135. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. *Dewey v. Des Moines*, supra, 199; *Keokuk and Hamilton Bridge Co. v. Ill.*, supra, 534. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here \* \* \*."

Similar views were expressed in the 1929 case of *White River Lumber Company v. State of Arkansas, ex rel. Applegate*, 279 U. S. 692, 49 Sup. Ct. 457, 73 Law Ed. 903 (rehearing denied, 50 Sup. Ct. 78):

"It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the state; and as it was sought to raise this question for the first time by assignments of error in this court, it is necessarily excluded from our consideration."

It is not clear to us whether or not Petitioner Wells is listing as a basis for jurisdiction of this court the argument that because he had been denied bail in the trial court he had been deprived of his constitutional right. His brief mentions this point in only two places:

(1) "That he took an appeal from the ruling of the Honorable Wm. J. Baxter, to the Court of Appeals, which affirmed the judgment of the Madison Circuit Court, denying his petition for bail; That the action of both courts was in the opinion of your petitioner illegal, arbitrary, capricious and in violation of his constitutional rights to bail; That he was confined in jail in Richmond, Madison County, Kentucky until after his trial; That his case was set for trial on Monday, February 12th., 1945; That by reason of illegal restraint he was unable to properly prepare his case for trial, February 12th., 1945." (Page 2, Petitioner's Brief).

(2) "The defendant was tried by a jury of Madison County citizens selected in the manner detailed in part

"B" of this brief February 12, 1945 he was unable to get out and talk to his witnesses or prepare his proof in the case.

"Your petitioner contends that he was deprived of his liberty under section 14 of the Constitution of the United States; that on account of his being unable to talk to his witnesses and prepare his evidence, he was convicted of voluntary manslaughter on trial and was sentenced to the penitentiary for a period of five years." (Page 20, Petitioner's brief).

Petitioner cites no authority for his contention that refusal of bail in the case of a capital offense when, under the State Constitution as interpreted by a state Court of Appeals, a court is given discretion on that question, deprives a defendant of his constitutional rights. Nevertheless, we have searched the record (Case No. 69352 in the office of the Clerk of the Kentucky Court of Appeals) and the decision of the case of *Wells v. Dunn, Jailer*, supra, in which judgment of the lower court denying bail was sustained, and fail to find that Wells at any time raised the federal issue. Never did he allege that a right guaranteed him by the Constitution of the United States had been denied him. His argument has been based entirely on Section 16 of the Constitution of Kentucky, part of which we have quoted above.

This court has long followed the rule of accepting as authoritative the interpretations of the highest courts in the various states concerning their own Constitutions. Those interpretations, when not involving a federal question, are not overturned by this court. That principle is stated in 14 Am. Jur., "Courts," Section 99, as follows:

"Upon the construction of the Constitution and laws of a state, the United States courts, as a general rule, have always followed the decision of the highest court of the state unless they conflict with or impair the efficacy of some principle of the Federal Constitution or the Federal statutes. The United States Supreme Court is not authorized to inquire into the grounds

and reasons on which the Supreme Court of a state proceed in its construction of the statutes and Constitution of that state."

Citations supporting this principle are numerous and we think only one will suffice at this time. According to *Highland Farms Dairy v. Agnew*, (1937), 300 U. S. 608, 57 Sup. Ct. 549, 81 Law Ed. 835,

"A judgment by the highest court of a state as to the meaning and effect of its own constitution is decisive and controlling everywhere."

In the Petitioner's application for bail, the Kentucky Court of Appeals rendered a judgment as to the effect of Section 16 of the Kentucky Constitution on Petitioner Cecil Wells and his application for bail. The Kentucky court discussed no Federal question and for aught that appears in the record, no such question was presented to that court. Petitioner Wells, therefore, may not raise in this court for the first time a contention that denial of bail by the Madison Circuit Court violated the rights guaranteed him by the 14th Amendment.

### MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

Because we are of the opinion that the Supreme Court of the United States has no jurisdiction, respondent respectfully submits this statement and moves the court to dismiss the petition of Cecil Wells for writ of certiorari.

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